Malaysian Newsprint Industries Sdn Bhd v Bechtel International, Inc & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6–22–1126 OF 2002
ABDUL MALIK ISHAK J
5 MAY 2008

Civil Procedure — Stay of proceedings — Arbitration — Agreement contained arbitration clause — Project services under agreement were due to end — Parties entered into negotiations for extended project services — Whether arbitration clause had been incorporated into and applied to 'extended project services'

Contract — Terms — Incorporation — Technical Services Agreement between parties were due to end — Parties entered into negotiations for extended project services — Further revised cost estimates remained outstanding — Duration of the 'extended project services' already agreed upon — Whether failure of parties to reach agreement on further terms invalidated existing contract

The defendants applied for a stay of the proceedings pending arbitration pursuant to s 6 of the Arbitration Act 1952 (Act 93) ('the Act'). The senior assistant ('SAR') registrar granted, inter alia, the following orders: (i) the stay of the proceedings pursuant to s 6 of the Act; and (ii) that costs of the application be costs in the cause. Aggrieved by the decision, the plaintiff filed an appeal against the whole decision. The defendants too were unhappy against the part of the decision which ordered that costs be in the cause. Consequently, the defendants also filed an appeal. On 30 July 1996, the plaintiff and the defendants entered into an agreement known as the technical services agreement ('TSA'). There was an arbitration clause in the TSA. The defendants' project services under the TSA were due to end on 30 September 1996. But the plaintiff still needed the project services of the defendants under the TSA beyond 30 September 1996. With this in mind and at the behest of the plaintiff, the parties entered into negotiations and discussions in September 1996. The crux of the defendants' position was that the TSA including its arbitration clause had been incorporated into and applied to the 'extended project services' as well. This was denied by the plaintiff. Thus, the main issue before this court was, whether the TSA has been incorporated into and was to apply to the 'extended project services. If the TSA did not apply to the 'extended project services', that will be the end of the matter, and no arbitration agreement existed in relation to such services.

Held, allowing the appeal with costs:

(1) Based on the facts of the case, it was clear that the defendants performed the 'extended project services' from 1 October 1996 and thus, it was on this date that the 'extended project services' crystallised. The defendants invoiced for the 'extended project services' and the plaintiff paid for them based upon the terms of the TSA. Therefore, the 'extended project services' performed by the defendants were governed by the TSA which must necessarily include the arbitration clause (see paras 38 & 40–41).

(2) Further, the plaintiff will be estopped from arguing against the unequivocal letter of 1 October 1996 because the defendants had acted in good faith by relying on the contents of the letter dated 1 October 1996 when the defendants mobilised and carried out the 'extended project services' from 1 October 1996 onwards and, consequently, it would be unjust for the plaintiff to deny it now (see para 45).

(3) In the instant case, upon completion of the whole project, the plaintiff being satisfied and elated with the defendants' services, issued a letter of appreciation which signified that the plaintiff bore no complaint against the services rendered. In the circumstances, it was clear that the plaintiff had accepted that the TSA was applicable and that the plaintiff knew it was unable to launch a claim against the defendants, which constituted an irresistible conclusion (see para 55).

(4) The general principle of law as set out in O 59 r 3(2) of the Rules of the High Court 1980 ('RHC') is that 'costs to follow the event'. It means that the plaintiff as the unsuccessful party has to pay the costs to the defendants who are the successful parties and the plaintiff is left to bear its own costs. This general principle of law should be dutifully followed 'except when it appears to the court that in the circumstances of the case some other order should be made'. The SAR did not give any reason as to why this rule was not complied with. Further, no submission was advanced by the plaintiff to show that there existed some circumstances that merit a departure from the general rule (see paras 62 & 67).

[Bahasa Malaysia summary

Defendan telah memohon untuk penggantungan prosiding sementara menunggu penimbangtaraan menurut s 6 Akta Timbangtara 1952 (Akta 93) ('Akta'). Penolong kanan pendaftar ('PKP') telah memberikan, antara lain,

perintah-perintah berikut: (i) penggantungan prosiding menurut s 6 Akta; dan (ii) bahawa kos permohonan adalah kos dalam kausa. Terkilan dengan keputusan, plaintif memfailkan rayuan terhadap keseluruhan keputusan. Defendan-defendan juga tidak gembira dengan bahagian keputusan yang memerintahkan bahawa kos adalah dalam kausa. Oleh itu, defendan-defendan juga telah memfailkan rayuan. Pada 30 Julai 1996, plaintif dan defendan-defendan telah memasuki perjanjian yang dikenali sebagai perjanjian perkhidmatan teknikal ('PPT'). Terdapat klausa timbang tara dalam PPT tersebut. Perkhidmatan projek defendan-defendan di bawah PPT telah dijangka tamat pada 30 September 1996. Namun plaintif masih memerlukan perkhidmatan projek defendan-defendan di bawah PPT selepas 30 September 1996. Oleh yang demikian dan atas arahan plaintif, pihak-pihak telah mengadakan rundingan dan perbincangan pada bulan September 1996. Intipati kedudukan defendan-defendan adalah bahawa PPT termasuk klausa timbang taranya telah pun dimasukkan dalam dan terpakai untuk 'extended project services' juga. Ini dinafikan oleh plaintif. Oleh itu, isu utama di hadapan mahkamah adalah, 'whether the TSA has been incorporated into and was to apply to the 'extended project services'. Jika PPT tidak terpakai dalam 'extended project services', ia akan menamatkan perkara ini, dan tiada perjanjian timbang tara wujud berkaitan perkhidmatan sedemikian.

Diputuskan, membenarkan rayuan dengan kos:

(1) Berdasarkan kepada fakta kes, adalah jelas bahawa defendan-defendan telah melaksanakan 'extended project services' dari 1 Oktober 1996 dan oleh itu, adalah pada tarikh ini 'extended project services' terlaksana. Defendan-defendan menghantar invois untuk 'extended project services' dan plaintif membayarnya berdasarkan kepada terma-terma PPT. Oleh yang demikian, 'extended project services'yang dilaksanakan oleh defendan-defendan dikawal oleh PPT yang hendaklah termasuk klausa timbang tara (lihat perenggan 38 & 40–41).

(2) Selanjutnya, plaintif diestop daripada berhujah tentang surat 1 Oktober 1996 yang tak taksa itu kerana defendan-defendan telah bertindak atas niat baik dengan bergantung kepada kandungan surat bertarikh 1 Oktober 1996 apabila defendan-defendan mengerjakan dan melaksanakan 'extended project services' bermula dari 1 Oktober 1996 dan, berikutan itu, ia adalah tidak adil untuk plaintif menafikannya sekarang (lihat perenggan 45).

(3) Dalam kes ini, selesainya keseluruhan projek tersebut, plaintif yang berpuashati dan gembira dengan perkhidmatan yang diberikan oleh defendan-defendan, mengeluarkan surat penghargaan yang menunjukkan bahawa plaintif tidak mempunyai rungutan terhadap

perkhidmatan yang diberikan. Dalam keadaan tersebut, adalah jelas bahawa plaintif telah menerima PPT sebagai terpakai dan bahawa plaintif mengetahui bahawa ia tidak boleh membuat tuntutan terhadap defendan-defendan, yang merupakan kesimpulan yang tidak boleh ditentang (lihat perenggan 55).

(4) Prinsip am undang-undang seperti yang dinyatakan dalam A 59 k 3(2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') adalah bahawa 'costs to follow the event'. Ini bermaksud bahawa plaintif sebagai pihak yang tidak berjaya hendaklah membayar kos kepada defendan-defendan yang merupakan pihak-pihak yang berjaya dan plaintif hendaklah menanggung kosnya sendiri. Prinsip undang-undang am ini hendaklah dipatuhi 'except when it appears to the court that in the circumstances of the case some other order should be made'. PKP tidak memberikan apa-apa alasan berhubung kenapa kaedah ini tidak dipatuhi. Tambahan pula, tiada penghujahan dikemukakan oleh plaintif untuk menunjukkan bahawa terdapat beberapa keadaan yang mewajarkan penyimpangan daripada keadah am tersebut (lihat perenggan 62 & 67).]

Notes

For cases on arbitration, stay of proceedings, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6540–6561.

For cases on incorporation of contract terms, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 5356–5359.

Cases referred to

Ali Shipping Corp v Shipyard Trogir [1998] 2 All ER 136; [1999] 1 WLR 314 (refd)

Amalgamated Investment & Property Co Ltd (in Liq) v Texas Commerce International Bank Ltd [1982] QB 84; [1981] 3 All ER 577; [1981] 3 WLR 565 (refd)

B Surinder Singh Kanda v Government of the Federation of Malaya [1962] AC 322 (refd)

Bauer (M) Sdn Bhd v Daewoo Corp [1999] 4 MLJ 545 (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)

British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd [1975] 1 QB 303 (refd)

British Guiana Credit Corp v Clement Hugh Da Silva [1965] 1 WLR 248 (folld)

Compagnie Graniere SA v Fritz Kopp AG [1980] 1 Lloyd's Rep 463 (refd)

David Taylor & Son Ltd v Barnett Trading Co [1953] 1 WLR 562 (refd)

Dermajaya Properties Sdn Bhd v Premium Properties Sdn Bhd & Anor [2002] 2 SLR 164 (refd)

Dolling-Baker v Merrett & Ors [1991] 2 All ER 890; [1990] 1 WLR 1205 (refd)
Elgindata Ltd (No 2), Re [1993] 1 All ER 232 (refd)
Faubert & Watts v Temagami Mining Co Ltd (1959) 17 DLR (2d) 246 (refd)
Hassneh Insurance Co of Israel & Ors v Steuart J Mew [1993] 2 Lloyd's Rep 243 (refd)
Hodgkinson, Hodgkinson, In re v Hodgkinson (1895) 2 Ch 190 (refd)
Jeuro Development Sdn Bhd v Teo Teck Huat (M) Sdn Bhd [1998] 6 MLJ 545 (refd)
JF Finnegan Ltd v Sheffield City Council [1989] 43 Build LR 124; [1989] 5 Const LJ 54 (refd)
Lee Guan Par v Hotel Universal Sdn Bhd [2005] 4 MLJ 589 (refd)
Lim Su Sang v Teck Guan Construction & Development Co Ltd [1966] 2 MLJ 29 (refd)
Lister v Romford Ice and Cold Storage Co Ltd [1957] AC 555; [1957] 1 All ER 125 (refd)
Liverpool City Council v Irwin & Anor [1977] AC 239; [1976] 2 All ER 39 (refd)
Mangistaumunaigaz Oil Production Association v United World Trade Inc [1995] 1 Lloyd's Rep 617 (refd)
Navigazione Alta Italia SpA v Concordia Maritime Chartering AB (The Stena Pacifica) [1990] 2 Lloyd's Rep 234 (refd)
Pagnan SpA v Feed Products Ltd [1987] 2 Lloyd's Rep 601 (folld)
Petroliam Nasional Bhd (PETRONAS) & Anor v Cheah Kam Chiew [1987] 1 MLJ 25 (refd)
Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97 (refd)
Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena) [1995] 3 MLJ 273 (refd)
Tan Tong Meng (Pte) Ltd v Artic Builders & Co (Pte) Ltd [1986] 2 MLJ 241 (refd)
Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd & Anor (No 2) [1988] 2 MLJ 502 (refd)
Universal Petroleum Co Ltd (in liquidation) v Handels-und Transportgesellschaft mbH [1987] 2 All ER 737 (refd)
Woh Hup (Pte) Ltd v Property Development Ltd [1991] 3 MLJ 82 (refd)

Legislation referred to

Arbitration Act 1952 ss 2, 6, 13(1), 13(2), 13(3), 14(3)(a)
Arbitration Act 2005 s 51
Evidence Act 1950 s 2
Rules of the High Court 1980 O 59 r 3(2)

Chang Wei Mun (Raja Darryl & Loh) for the plaintiff.
Rodney Colin Gomez (Jason Lai with him) (Shearn Delamore & Co) for the defendant.

Abdul Malik Ishak J (now JCA):

INTRODUCTION

[1] By way of encl 12, the defendants applied for a stay of the proceedings herein pending arbitration pursuant to s 6 of the Arbitration Act 1952 (Act 93). The application was heard by the senior assistant registrar ('SAR') and in due course she granted, inter alia, the following orders:

(a) the stay of the proceedings pursuant to s 6 of the Arbitration Act 1952 (Act 93); and

(b) that costs of the application be costs in the cause.

[2] Aggrieved by the decision of the SAR, the plaintiff filed an appeal to the judge in chambers against the whole decision and that appeal can be seen in encl 49.

[3] The defendants too were unhappy against that part of the decision of the SAR which ordered that costs be in the cause. The defendants preferred that costs be given to them in accordance to what they had asked for in encl 12. Consequently, the defendants also filed an appeal to the judge in chambers and this can be seen in encl 48.

[4] Numerous affidavits were filed by the parties and some of these affidavits will be alluded to in this judgment.

THE FACTS

[5] On 30 July 1996, the plaintiff and the defendants entered into an agreement known as the technical services agreement ('TSA'). Under the TSA, the defendants agreed to review and analyse plans obtained by Genting Sanyen Newsprint for the construction of a newsprint facility. The TSA contained a scope of work in Appendix 'A' and a schedule of rates in Appendix 'B'. Under Appendix 'A', the defendants agreed to produce two requests for proposal documents. One request was for the balance of the engineering work needed to complete the plans and specifications. While the other request related to the project construction and construction management after the plans were completed.

[6] The TSA was exhibited as an exhibit marked as 'SMK-1' annexed to the affidavit in reply of Stephen Malcolm Knapp that was affirmed on 20 June 2003 as seen in encl 17. Article XIII of the TSA was worded in this way:

ARTICLE XIII — DISPUTE RESOLUTION

Any dispute arising out of this Agreement shall be mutually resolved through good faith negotiations between OWNER (referring to the plaintiff) and CONSULTANT (referring to the defendants). If the dispute is not resolved to the mutual satisfaction of both parties within thirty (30) days or such longer time as is mutually agreed the parties will attempt to resolve the dispute through the process of mediation.

[7] The resolution of any dispute between the parties must be resolved through the process of mediation. And if mediation fails, the parties will proceed to arbitration. It must be emphasised that the TSA contained an arbitration clause and it was pursuant to this clause that the SAR granted the stay to enable the parties to refer the dispute to arbitration. The arbitration clause in the TSA was worded in this way:

ARBITRATION

If mediation fails the OWNER (referring to the plaintiff) and CONSULTANT (referring to the defendants) agree to submit any such dispute or claim arising out of or relating to this Agreement or breach thereof, to arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with these rules. The arbitration proceedings shall be held in Kuala Lumpur, Malaysia and shall be conducted in the English language. Judgment upon any award rendered may be rendered in any court having jurisdiction or application may be made to such court for a judicial acceptance of the award or an order of enforcement, as the case may be.

[8] The validity of the TSA was not in issue. The TSA was signed by both the plaintiff and the defendants and it was duly and officially stamped in accordance with Malaysian requirements signalling that it was a recorded international contract in compliance with the Malaysian law. And as a result of this signed TSA, the plaintiff provided the defendants with a purchase order assigning a defined charge number to the services provided under the TSA. The representatives of the plaintiff and the first and second defendants described the work under the TSA as the 'project services'.

[9] Now, the defendants' project services under the TSA were due to end on 30 September 1996. But the plaintiff still needed the project services of the defendants under the TSA beyond 30 September 1996. With this in mind and at the behest of the plaintiff, the parties entered into negotiations and discussions in September 1996. Stephen Malcolm Knapp participated in these discussions for the first defendant.

[10] Based on the negotiations and discussions between the plaintiff and the first and second defendants, the parties agreed and intended that the

terms and conditions of the TSA applied to the 'extended project services'. In fact, the first and second defendants proceeded with its work after 30 September 1996 on this basis and at no time did any representatives from the plaintiff ever told any representatives of the first and second defendants that the 'extended project services' was not governed by the TSA. The parties fully intended that the TSA governed the 'extended project services'.

[11] The first and second defendants submitted proposals in September and October of 1996 that were expressly offered subject to the express terms and conditions of the TSA. Each proposal showed the same proposal number and that was 40-96P-875 together with a chronological revision number. The proposals were issued in response to the plaintiff's requests for changes in scope, duration, number of persons working on the project and the rates. The contemporaneous records and specifically these proposals and the plaintiff's replies to them, confirmed that the plaintiff and the first and second defendants understood and agreed that the 'extended project services' being performed by the first and second defendants after 30 September 1996 were governed by the TSA including the arbitration clause.

[12] On 1 October 1996 and as a reply to the defendants' letter dated 25 September 1996, the plaintiff confirmed the continuing engagement of the defendants' 'extended project services' pursuant to the terms and conditions of the TSA. The letter from the plaintiff's project manager by the name of Peter Williamson addressed to the defendants dated 1 October 1996 as seen in exh 'SMK-5' to encl 17 categorically showed that the plaintiff continued to engage the defendants in accordance to the terms and conditions as set out in the TSA. The letter was quite long and the relevant part of the said letter can be seen at the third last paragraph and it was worded as follows (see exh 'SMK-5' of encl 17):

> We apologise for the continued change in direction by MNI but look forward to negotiating a mutually acceptable arrangement for the next few weeks and discussing the longer term options with you whilst you are here in KL next week, and trust this fax is sufficient confirmation of our continuing to engaging Bechtel/BE & K (on the same terms and conditions as detailed in the previous Technical Services agreement) for this extension period, and additional work already performed (ie the US$50,000). Final invoicing will be based on approved invoices for actual costs of services and disbursements.

[13] As a result of the plaintiff's confirmation vide letter dated 1 October 1996 as seen in exh 'SMK-5' of encl 17, the defendants mobilised its personnel and started to perform the 'extended project services' from 1 October 1996 itself. The plaintiff had agreed that the defendants were to start the 'extended project services' on 1 October 1996.

[14] Whilst work had commenced on the 'extended project services', there were continuing discussions about the personnel that were needed and the breadth of the services to be supplied. Towards this end, the parties held a meeting and following that meeting the plaintiff issued another letter to the defendants dated 15 October 1996. Again, in that letter, the plaintiff confirmed that the 'extended project services' were to be provided pursuant to the terms and conditions of the TSA. The letter can be seen in exh 'SMK-7' of encl 17 and it was worded as follows:

> Thank you for your proposal of October 14, 1996 for the B&BJV's expanded and extended services through to the end of January 1997.
>
> As discussed I would like you to submit a modified proposal later this week together with the missing attachments. The modified proposal should separate out the packages that could be put out to open bid without disrupting our cost and schedule. This includes the construction activity and probably most of the 'Balance of Engineering'. Please look for any other opportunities.
>
> We would also like you to reflect the points agreed on cost forecasting and cost management of your work for us.
>
> Please also include the cost of local accommodation at US$60/day. Although MNI pay that, it is a cost that is part of our use of B&BJV and so must be included to represent the full picture.
>
> As discussed it hurts us to have to pay the 10% withholding tax. Please explore within your organisation and with Ms. Teoh of KPMG whether we can reduce or eliminate this.
>
> Subject to the above modifications I have pleasure in confirming that the B&BJV is to be engaged by MNI to complete the extended and expanded programme through to the end of January 1997.
>
> We will issue a formal purchase order for the assignment following receipt of the revised proposal.
>
> Regards, Sgd.
>
> (Illegible)
>
> Graham Ogilvie

[15] So, it can be readily seen that the plaintiff had authorised performance of the 'extended project services' under the terms of the TSA in writing on 1 October 1996 and 15 October 1996. Those authorisations were not rescinded nor superceded either in writing or verbally and the first and second defendants relied on those written authorisations for the continued performance of the 'extended project services' beyond 1 October 1996.

[16] The project was successfully completed and, on 18 February 1999, the plaintiff wrote a letter to the defendants expressing their appreciation for the

success of the project. That letter was annexed as an exh 'A1' to the affidavit in reply of the defendants affirmed by Wong Youn Yuen on 6 February 2003 as seen in encl 15 and that letter was worded as follows:

> MNI MENTAKAB 1 PROJECT — CONSTRUCTION SERVICES LETTER OF APPRECIATION
>
> On behalf of the MNI Project team, I would like to extend our sincere appreciation to the BBI team on their dedicated support in achieving our successful start-up at Mentakab.
>
> Your company resources and commitment to see the job through was a major contributor to our successful project completion. The effort by your key managers, Rick McAlmond, Bob Calderone, Thorn Watson, Derek Nicholson and Mark Helwig, reinforced the MNI commitment to safety, quality and schedule goals.
>
> A special thank you to both home offices for their project commitment and support through some challenging events of this project. Only through your decision to meet our project team resource requirements could such an opportunity exist to say thank you.
>
> Once again congratulation to the BBI team in achieving our successful start-up of the first newsprint manufacturing facility in Malaysia. We invite you to visit our state-of-the-art facility to see for yourself the job well done.

ANALYSIS

[17] Malaysia enacted a new Arbitration Act 2005 (Act 646) on 30 December 2005 based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. The new Act comes into force on 15 March 2006 and it repeals and replaces the previous Arbitration Act 1952 (Act 93). The new Act will be applicable to all arbitrations commenced after 15 March 2006 while the old Act of 1952 will continue to apply to arbitral proceedings commenced before the operative date of the new Act. Section 51 of the Arbitration Act 2005 (Act 646) enacts as follows:

> Repeal and savings
>
> (1) The Arbitration Act 1952 [Act 93] and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 [Act 320] are repealed.
>
> (2) Where the arbitral proceedings were commenced before the coming into operation of this Act, the law governing the arbitration agreement and the arbitral proceedings shall be the law which would have applied as if this Act had not been enacted.
>
> (3) Nothing in this Act shall affect any proceedings relating to arbitration which have been commenced in any court before the coming into operation of this Act.

[18] When the parties argued before me, they were relying solely on the Arbitration Act 1952 (Act 93) and this judgment will focus solely on that Act. A

[19] Section 6 of the Arbitration Act 1952 (Act 93) enacts as follows:

> 6 Power to stay proceedings where there is submission to arbitration. B
>
> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the C court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings. D

[20] I must categorically state that the courts in Malaysia favour an arbitration unless there are some exceptional reasons that exist to disallow it. The Supreme Court in *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97, speaking through Edgar Joseph Jr SCJ, sets out E the correct approach in very clear terms. This was what His Lordship said at p 112 of the report:

> It is well known that if a party can satisfy the court that the conditions for the grant of a stay under s 6 of the Act are satisfied, it does not ipso facto follow that he will F be entitled, as of right, to a stay, for the court still retains a discretion to refuse it. But, generally, as the judge rightly recognised, the approach of the court will be that those who make a contract to arbitrate their disputes, should be held to their bargain for, in the oft-quoted words of Martin B in *Wickham v Harding* [1859] 28 LJ Ex 215, 'A bargain is a bargain, and the parties ought to abide by it, unless a G clear reason applies for their not doing so'.

[21] This very passage was quoted favourably by the Federal Court in *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena)* [1995] 3 MLJ 273, and Gopal Sri Ram JCA who wrote the judgment of the Federal H Court aptly said at p 282 of the report:

> given an agreement to arbitrate and the satisfaction of the conditions set out in s 6 of the Act, a court should lean towards the grant of a stay.

I

[22] Section 2 of the Arbitration Act 1952 (Act 93) defines 'arbitration agreement' as 'a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not'. Thus, an agreement to arbitrate may either be contained in an existing contract or in

a separate agreement between the parties to be activated when a dispute arises under the contract (*Compagnie Graniere SA v Fritz Kopp AG* [1980] 1 Lloyd's Rep 463) or when a dispute arises between the parties (*Navigazione Alta Italia SpA v Concordia Maritime Chartering AB (The Stena Pacifica)* [1990] 2 Lloyd's Rep 234). If an arbitrator is not named that does not pose a problem. In this connection, Thomson LP gave a sound advice in *Lim Su Sang v Teck Guan Construction & Development Co Ltd* [1966] 2 MLJ 29, at p 31 (FC):

> By the Arbitration Act 1950, the court had power to appoint an arbitrator when the parties had agreed to submit to arbitration and had not nominated an arbitrator. The parties in the present case had clearly intended to submit their disputes to arbitration. Parties commonly agreed to submit to arbitration without naming an arbitrator at the outset of their contract and there was much to commend that practice. There was nothing therefore in the point that an arbitrator was not named nor in the fact that the words following the blank space were left in. In the absence of a name those words were of no effect and could be ignored.

[23] The parties are at liberty to decide on how to word the arbitration agreement provided it is clear and certain (*Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena)*). The agreement to arbitrate is just like a contract and it must be clear and certain. It will be construed to be void for uncertainty if its meaning is so ambiguous that it is incapable of being construed to give the agreement a certain degree of certainty. The courts will try to resolve the ambiguity that exists within the agreement, where possible, in order to support the parties in their intention to refer their dispute to arbitration. A classic example would be the case of *Mangistaumunaigaz Oil Production Association v United World Trade Inc* [1995] 1 Lloyd's Rep 617 where the arbitration agreement stipulated that, 'Arbitration, if any, by ICC rules in London'. It was argued that the phrase 'if any' rendered the arbitration agreement too vague. But the judge disagreed and held that the phrase 'if any' was meaningless and thus could be ignored. Alternatively the judge held that that phrase could be construed as an abbreviation for 'if any dispute arises'. On either conclusion, the court held that the arbitration clause was not uncertain. In sharp contrast would be the case of *JF Finnegan Ltd v Sheffield City Council* [1989] 43 Build LR 124; [1989] 5 Const LJ 54 where the court held that a clause in the contract that it was a matter for further discussion as to whether disputes under the contract were to be referred to arbitration was said to be too vague.

[24] It must be borne in mind that no specific words or form are required to constitute an arbitration agreement. What is certain is this. That the agreement to refer disputes to arbitration is essential and the intention of the parties to arbitrate must be clear and unequivocal. Another certainty is this. That where there is a clear intention to arbitrate, the court will give effect to

the agreement even if the clause is incomplete or lack certain particulars (*Woh Hup (Pte) Ltd v Property Development Ltd* [1991] 3 MLJ 82). A

[25] Here, there is an arbitration clause in the TSA. The mode of appointment of the arbitrators is also set out. It is in accordance to the Rules of Conciliation and Arbitration of the International Chamber of Commerce. The venue where the arbitration should take place has been specified. It is in Kuala Lumpur, Malaysia and the language to be used in the arbitration has also been specified. It is to be conducted in the English language. It must be borne in mind that the venue specified in the arbitration clause has a direct impact on the curial law of the arbitration. Here, by stipulating Kuala Lumpur, Malaysia as the venue will subject the arbitral proceedings to the jurisdiction of the Malaysian High Court and its laws (see *Halsbury's Laws of Malaysia*, Vol 13, para 220.006 at p 9; and see also by way of a comparison the case of *Dermajaya Properties Sdn Bhd v Premium Properties Sdn Bhd & Anor* [2002] 2 SLR 164). In fact, it is stipulated in the arbitration clause that 'the judicial acceptance of the award may be made to such court' which by necessary implication it refers to the Malaysian High Court. Incidentally, the laws of the country in accordance with which the TSA should be governed and construed is set out in Article XIV of the TSA itself. And that Article is worded in this way: B C D E

> ARTICLE XIV — APPLICABLE LAW
>
> This Agreement shall be construed and interpreted in accordance with the laws of Malaysia provided that CONSULTANT (referring to the defendants) shall not be required to perform or omit any act which would constitute a violation of the laws of the United States. F

[26] It is interesting to note that the word 'award' is not defined in the Arbitration Act 1952 (Act 93). The definition of the word 'award' in *Black's Law Dictionary* (6th Ed, 1990), West Publication, as: G

> The decision or determination rendered by arbitrators or commissioners, or other private or extra-judicial deciders, upon a controversy submitted to them; also the writing or document embodying such decision. H

was adopted by the court in *Jeuro Development Sdn Bhd v Teo Teck Huat (M) Sdn Bhd* [1998] 6 MLJ 545 at p 551.

[27] Simply put, an award made by an arbitrator relates to the controversy submitted and decided by him. It sets out the reasons for the decision and that decision must be a decision that decides on all the issues involved in the controversy. In *David Taylor & Son Ltd v Barnett Trading Co* [1953] 1 WLR 562 at p 568, the court said: I

A The duty of an arbitrator is to decide the questions submitted to him according to the legal rights of the parties, and not according to what he may consider fair and reasonable under the circumstances.

B **[28]** Speed is the order of the day. The arbitrator is certainly under a duty to proceed with the arbitration with due diligence and reasonable despatch in arriving at his award. An arbitrator who slackens may be removed forthwith by the court (see s 14(3)(a) of the Arbitration Act 1952 (Act 93)).

C **[29]** It is also opportune to state that the award by an arbitrator must be in a form capable of being enforced. Thus, a monetary award must be clear as to the amount that is awarded so that it can be paid. If it pertains to a performance award, it must specify the time within which the award is to be performed. It is ideal to read Mustill MJ and Boyd SC, *The Law and Practice of Commercial Arbitration in England* (2nd Ed, 1989) at pp 387 and 389 on
D the subject of enforcement of an award. In the context of an enforcement of the award as set out in the arbitration clause as found in the TSA, it is through the mechanism of the court that an award is enforced.

E **[30]** According to the case of *Universal Petroleum Co Ltd (in liquidation) v Handels-und Transportgesellschaft mbH* [1987] 2 All ER 737, an arbitrator's primary findings of fact are final and such findings are intended to be immune from review by the courts unless there are breaches of natural justice. Laidlaw JA aptly said in the case of *Faubert & Watts v Temagami Mining Co*
F *Ltd* (1959) 17 DLR (2d) 246 at p 256:

It is the duty of an arbitrator, in the absence of express provision in the submission to the contrary, to decide the question submitted to him according to the legal rights of the parties, and not according to what he may consider fair and reasonable under the circumstances.

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[31] Be that as it may, there are authorities that say that the powers of the arbitrator are always subject to the overriding rules of natural justice (*Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd & Anor (No 2)* [1988]
H 2 MLJ 502; and *Tan Tong Meng (Pte) Ltd v Artic Builders & Co (Pte) Ltd* [1986] 2 MLJ 241 (PC)). 'Impartiality' and 'fairness' are the key words in natural justice. Two latin phrases must be put to the forefront. The first would be '*nemo debet esse judex in sua causa*' (no man shall be judge in his own cause). The second would be '*audi alteram partem*' (both sides shall be heard).
I So, it is the duty of the arbitrator to make doubly sure that every party to a dispute must be given a fair opportunity to, firstly, present his case and, secondly, to answer the case of his opponent. At this juncture, it is ideal to refer to the speech of Lord Denning in *B Surinder Singh Kanda v Government of the Federation of Malaya* [1962] AC 322 at pp 337–338:

> In the opinion of Their Lordships, however, the proper approach is somewhat different. The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: *Nemo judex in causa sua* and *Audi alteram partem*. They have recently been put in the two words, impartiality and fairness. But they are separate concepts and are governed by separate considerations. In the present case Inspector Kanda complained of a breach of the second. He said that his constitutional right had been infringed. He had been dismissed without being given a reasonable opportunity of being heard.
>
> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn LC in *Board of Education v Rice* [1911] AC 179, at p 182; 27 TLR 378 (HL) down to the decision of Their Lordships' Board in *Ceylon University v Fernando* [1960] 1 WLR 223; [1960] 1 All ER 631 (PC). It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not inquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the judge without his knowing.

[32] In an arbitration proceeding, the court room atmosphere is avoided. In Malaysia, the non-judicious element of arbitration can readily be appreciated because by virtue of s 2 of the Evidence Act 1950 the law of evidence is excluded from being applied to arbitration proceedings. That does not mean that the arbitration will be conducted in a haphazard fashion. On the contrary, the rules of natural justice will be adhered to strictly. By virtue of s 13(1) of the Arbitration Act 1952 (Act 93), all parties shall submit to be examined by the arbitrator in relation to the matters in dispute. And according to s 13(1) of the Arbitration Act 1952 (Act 93) the parties are obliged to produce before the arbitrator all the documents in their possession when required to do so by the arbitrator. And according to s 13(2) of the Arbitration Act 1952 (Act 93), 19 witnesses in the proceedings are required to submit themselves for examination on oath or affirmation. Section 13(3) of the Arbitration Act 1952 (Act 93) provides that the arbitrators shall have the power to administer oaths or to take affirmations of the parties and their witnesses. These brief procedural measures reflect the viability of an arbitration proceeding under the Arbitration Act 1952 (Act 93).

[33] Now, the crux of the defendants' position was that the TSA including its arbitration clause has been incorporated into and applied to the 'extended

project services' as well. This was denied by the plaintiff. Thus, the main issue before this court was, 'whether the TSA has been incorporated into and was to apply to the 'extended project services'?' If the TSA did not apply to the 'extended project services', that will be the end of the matter, and it will have to be accepted that no arbitration agreement existed in relation to such services.

[34] In the course of the plaintiff's efforts to find sources for compensation for the losses occasioned by its poor management and poor judgments during the project, the plaintiff sought the advice of counsel about the enforceability of the clauses found in the TSA in connection with the proposed claim against the defendants. In due course, the plaintiff was advised that the clauses in the TSA were valid and enforceable under Malaysian law (see the affidavit in reply of Bob Ogletree that was annexed 20 as exh 'RCG-7' to the affidavit of Rodney Colin Gomez that was affirmed on 29 September 2004). It was only after receiving this opinion that the plaintiff began to assert that the defendants' services were governed by an agreement other than the TSA. This was done solely for the purpose of avoiding the implications of the TSA.

[35] Stephen Malcolm Knapp in his affidavit in reply in encl 17 explained the wrong usage of terminology employed by the parties. This was what he deposed to at para 6.5 of his affidavit in reply:

> 6.5 The parties did not refer to the work as 'Phase 1' or 'Phase 2'. Those terms were not used by Ang See Thai, Graham Ogilvie or Peter Williamson in any of their discussions with me or any other representative for the first and second defendants. The use of those terms by William Bruce Clarke in the plaintiff's second affidavit establishes that William Bruce Clarke's was not involved in the discussions and has no first hand knowledge about the TSA and its interpretation and application by the parties during the project work. It is clear to me that William Bruce Clarke did not participate in the discussions regarding the work or the meaning or application of the TSA. William Bruce Clarke did not participate in any discussions that took place and his lack of his first hand knowledge is confirmed by the fact that he does not even use the proper terminology when discussing the project or the work in question. Rather than Phase 1 and Phase 2 as set out by William Bruce Clarke, the representatives of the plaintiff and the first and second defendants described the work as the 'project services' and the 'extended project services' in our discussions at the time and in the contemporaneous documentation. The parties fully intended that the TSA governed both the project services and extended project services.

[36] It was argued that the plaintiff had not during the exchange of the affidavits 'led' any evidence to establish that the matters pleaded in the statement of claim arose exclusively during the period when the 'extended project services' were carried out. The plaintiff conceded that any dispute during the 'project services' of the TSA would be subject to arbitration but

failed to establish that the present dispute arose solely from the period of the 'extended project services'. Even if the purported cause of action arose during the period of the 'extended project services', the defendants took the position that the arbitration clause as found in the TSA has been incorporated and this meant that it was to apply to the 'extended project services'. A classic example, by way of an analogy, would be the case of *Bauer (M) Sdn Bhd v Daewoo Corp* [1999] 4 MLJ 545 where the Court of Appeal held that it was possible in law for the arbitration clause in the first works order to be incorporated in the subsequent works order provided that there was reference in the subsequent works order to the first works order. Here, in order to determine whether there was or was not an incorporation as intended by the parties, the approach that has to be taken by this court would be to determine 'at the end of the day, whether an incorporation by reference was intended by the parties in a particular case is a question that must be resolved according to the peculiar facts of the individual case' (to borrow the words of Gopal Sri Ram JCA in *Bauer (M) Sdn Bhd v Daewoo Corp* at p 557 line 'H'). Although in *Bauer*'s case, the Court of Appeal found on the facts that the 'incorporation' did not take place, the Court of Appeal only came to that conclusion after a review of the relevant documents. With this guideline, I will now embark on a detailed and analytical examination of the evidence in order to ascertain whether or not there has been such an incorporation in the present case at hand.

[37] So, the fundamental question to pose would be, when did the agreement for the 'extended project services' crystallise? This kind of approach was also adopted by the Privy Council in *British Guiana Credit Corporation v Clement Hugh Da Silva* [1965] 1 WLR 248 and by the Court of Appeal in *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601. To answer the question posed, an examination of the relevant documents must now be undertaken and for this exercise, I must be forgiven for repeating some of the facts once again:

(a) On 30 July 1996 the plaintiff and the defendants entered into the TSA (see exh 'SMK-1' of encl 17) for the project services. The TSA contained an arbitration clause. The duration of the project services were to end by 30 September 1996.

(b) In September 1996, the parties entered into negotiations for the 'extended project services' which were to commence on 1 October 1996.

(c) On 11 September 1996, the defendants prepared a draft proposal for the 'extended project services' which carried the following passage, that '... this assignment will be subordinated to the agreement signed on July 30,1996...' (see exh 'SMK-2' of encl 17).

(d) On 20 September 1996, the defendants made a revised proposal for the

'extended project services' which also carried a similar passage, that '... this assignment will be subordinated to the agreement signed on July 30,1996 ...' (see exh 'SMK-3'of encl 17).

(e) On 25 September 1996, the defendants made a further revised proposal for the 'extended project services' which contained the same similar passage, that '... this assignment will be subordinated to the agreement signed on July 30, 1996 ...' (see exh 'SMK-4' of encl 17). In the proposal letter itself, the defendants stated categorically that, 'We are not able to maintain our personnel on the project beyond October 1, without a confirmation that we will be reimbursed' (see exh 'SMK-4' of encl 17).

(f) On 1 October 1996, bearing in mind the deadline of September 30, the plaintiff responded and made certain crucial statements as seen in exh 'SMK-5' of encl 17, namely:

(i) We therefore suggest that we proceed in line with your fax of September 30 1996 (namely the US$132,000), but be prepared to negotiate an extension of this scope and dollars to take us through to the end of November.

(ii) We apologise for the continued change in direction by MNI but look forward to negotiating a mutually acceptable arrangement for the next few weeks and discussing the longer term options with you whilst you are here in KL next week, and trust this fax is sufficient confirmation of our continuing to engaging Bechtel/BE & K (on the same terms and conditions as detailed in the previous Technical Services agreement) for this extended period, and additional work already performed (ie the US$50,000).

(g) On 14 October 1996, the defendants made a further proposal as requested by the plaintiff and this proposal went up to January 1997. This proposal also carried the same phraseology, that '... this assignment will be subordinated to the agreement signed on July 30, 1996 and adhere to the same conditions ...' (see exh 'SMK-6' of encl 17).

(h) On 15 October 1996, the defendants services were extended right through to the end of January 1997 and the letter has been reproduced earlier as reflected at exh 'SMK-7' of encl 17.

(i) On 21 October 1996, the defendants submitted the revised proposal for engineering services for the Mentakab project for the period October 1996 until the end of January 1997 which carried the same passage (see exh 'P8' of the plaintiff's third affidavit in encl 19 affirmed by Graham Ogilvie on 10 October 2003) and

that passage was worded in this way, that '... this assignment will be subordinated to the agreement signed on July 30, 1996 and adhere to the same conditions'.

(j) On 31 October 1996, at the request of the plaintiff, the defendants again issued a proposal that reduced the estimated pricing (see exh 'P12' of encl 19).

(k) On 2 November 1996, the plaintiff agreed to the defendants' proposals (see exh 'P13' of encl 19).

(l) On 4 November 1996, the plaintiff requested the defendants to provide for an additional civil engineer (see exh 'P15' of encl 19).

(m) On 5 November 1996, the defendants replied to both letters as set out in paragraphs (k) and (I) of the above (see exh 'P16' of encl 19).

[38] In order to determine when the agreement for the 'extended project services' crystallised, the following salient facts must be borne in mind:

(a) On 30 September 1996, the defendants' services known as the 'project services' would end.

(b) The defendants made crystal clear that they would effectively demobilise on 1 October 1996 unless an agreement could be reached with the plaintiff in regard to the defendants' proposals.

(c) The defendants agreed to mobilise from 1 October 1996 as a direct result of the plaintiff's letter dated 1 October 1996 which specifically incorporated the TSA terms.

(d) The defendants performed the 'extended project services' from 1 October 1996 and it was on this date that the 'extended project services' crystallised.

[39] It defies belief that notwithstanding all the contemporaneous documents, the plaintiff argued as canvassed in the plaintiff's affidavits that the agreement for the 'extended project services' only crystallised on 2 November 1996.

[40] It must be borne in mind that the defendants invoiced for the 'extended project services' and the plaintiff paid for them based upon the terms of the TSA.

A **[41]** In my judgment, the agreement for 'extended project services' crystallised on 1 October 1996. And the 'extended project services' performed by the defendants were governed by the TSA which must necessarily include the arbitration clause.

B **[42]** The terms of the letter of 1 October 1996 clearly showed that the agreement for the 'extended project services' had taken place. It must be recalled that prior to the letter of 1 October 1996, the defendants had pointed out that they would have to stop work if no agreement was in place by then.

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[43] Running parallel with the principles as set out in the case of *Bauer* and, based on the facts, the irresistible conclusion would be that the terms of the TSA were incorporated into the agreement for the 'extended project services' inclusive of the arbitration clause.

D

[44] Before me, the plaintiff sought to avoid the irresistible conclusion by suggesting that the agreement for the 'extended project services' only crystallised on 2 November 1996 which was one month after the 'extended project services' started. It would be opportune, at this juncture, to refer to the case of *British Crane Hire Corporation Ltd v Ipswich Plant Hire Ltd* [1975] 1 QB 303, a decision of the Court of Appeal. In that case, it was held that once the hirer of a crane was requested by the contractor and it was delivered by the supplier that was when the agreement came into effect irrespective that the terms were only forwarded subsequently. Similarly, in the present case before me, once the defendants started performance of the 'extended project services' on 1 October 1996, the agreement crystallised on that date and that would be on 1 October 1996.

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G **[45]** Be that as it may, the plaintiff will be estopped from arguing against the unequivocal letter of 1 October 1996 because the defendants had acted in good faith by relying on the contents of the letter dated 1 October 1996 when the defendants mobilised and carried out the 'extended project services' from 1 October 1996 onwards and, consequently, it would be unjust for the plaintiff to deny it now. *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 (FC) summarised the width of the doctrine of estoppel by referring to the speech of Lord Denning in the *Amalgamated Investment & Property Co Ltd (in Liq) v Texas Commerce International Bank Ltd* [1982] QB 84 at p 122; [1981] 3 All ER 577 at p 584; [1981] 3 WLR 565 at p 575. This was what Lord Denning said:

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> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by

representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

[46] Here, from the facts, the plaintiff was aware that without any confirmation from the plaintiff by 1 October 1996, the defendants would have to demobilise and, consequently, the plaintiff intended that by its letter the defendants would act on it by starting to carry out the 'extended project services'. The principle of estoppel must be invoked in order to deprive the plaintiff from 'wriggling out' of the letter of 1 October 1996 and denying that the agreement for 'extended project services' crystallised on 1 October 1996.

[47] The stand of the defendants was quite simple. That the parties had on 1 October 1996 agreed to incorporate the terms and conditions of the TSA for the 'extended project services'. What needed fine tuning was in regard to the cost estimates for the 'extended project services' at the plaintiff's request. On 14 October 1996, the defendants submitted the revised pricing and cost estimates as can be seen in exh 'SMK-6' of encl 17 with a caveat that the assignment will be subordinated to the TSA. The plaintiff then responded positively by way of a letter dated 15 October 1996 which was signed by the managing director of the plaintiff and that letter can be seen in exh 'SMK-7' of encl 17. At this point of time, all the letters showed that the defendants were performing the 'extended project services' on the basis of the TSA. It cannot be denied that the terms and conditions of the TSA have been incorporated into the 'extended project services'. Again, the principle of estoppel would prevent the plaintiff from arguing out of the position that an agreement for the 'extended project services' was already in place. The letter of 15 October 1996 merely showed that the plaintiff was requesting for further revised cost estimates. And that was the only thing that remained outstanding.

[48] All the letters after 1 October 1996 merely related to issues pertaining to the price and cost estimation that were outstanding. By that time, the parties had already agreed to the terms and conditions that regulate the relationship for the duration of the 'extended project services'. At this

juncture, the law as set out by Lord Justice Lloyd in *Pagnan SpA v Feed Products Ltd* merits reproduction. There at p 619 of the report, His Lordship had this to say:

> (4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled (see *Love and Stewart Ltd v Instone & Co Ltd* per Lord Loreburn (1917) 33 TLR 475 at p 476).
>
> (5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.

[49] What Lord Justice Lloyd said in *Pagnan* ought to be applied to the present case at hand. Factually speaking, the matters outstanding after the letter of 1 October 1996 pertaining to the price and cost estimation were subsequently resolved.

[50] It is pertinent to examine the reason as to why the plaintiff is now asserting that the agreement for the 'extended project services' only arose on 2 November 1996. The explanation presented by the plaintiff and in particular through Graham Ogilvie was because the plaintiff and himself in particular disagreed on the limitation of liability clause as contained in the TSA. It was for this reason that the plaintiff attempted to avoid the incorporation of the TSA by suggesting that the agreement was only formed on 2 November 1996. Now, the letter of 2 November 1996 which the plaintiff sought to rely upon was in fact a reply to the letter of the defendants dated 31 October 1996. And the defendants' letter of 31 October 1996 expressly referred to the applicability of the TSA.

[51] I must categorically say that the argument that the agreement for the 'extended project services' only arose on 2 November 1996 was without merit for the following reasons:

(a) Since the 'extended project services' was factually performed from 1 October 1996 to 2 November 1996, what would one call the agreement governing this period if one were to believe the plaintiff's version that the agreement only occurred on 2 November 1996?

(b) And if the plaintiff was so concerned about the limitation of liability clause why was this clause incorporated in the TSA in the first place? Furthermore, the acceptance by the project manager in the person of Peter Williamson on 1 October 1996 (as per exh 'SMK-5' of encl 17) clearly made references to the incorporation of the terms and conditions of the TSA which, inter alia, contained a limitation of liability clause. It would be correct to say that the argument advanced by the plaintiff

was artificially created for the sole purpose of avoiding the TSA and its arbitration clause. It must be recalled that Graham Ogilvie on behalf of the plaintiff by letter dated 15 October 1996 as per exh 'SMK-7' of encl 17 had accepted and reaffirmed the plaintiff's commitment to the defendants' proposal of 14 October 1996 as seen in exh 'SMK-6' of encl 17 which were all made expressly on the stipulation that the 'extended project services' would be subordinated to the TSA. It can be surmised that Graham Ogilvie is now contradicting himself. The answer to the question as to why Graham Ogilvie undertook such an obvious contradiction can be found in the exhibits to the defendants' fourteenth affidavit as seen in encl 36. That affidavit highlighted the quandary that Graham Ogilvie found himself in — if he accepted that the TSA applied, then the plaintiff must be bound by an enforceable limitation of liability clause found in that agreement.

(c) Of significance would be this. There is no available contemporaneous written document stating that the plaintiff did not intend to utilise the terms and conditions of the TSA for the 'extended project services' because it had grave reservations or was opposed to the limitation of liability clause. The only evidence comes from the assertions of Graham Ogilvie who was involved in the discussion during the material time and who now claims that this was a fundamental drawback for the plaintiff for not objecting earlier.

[52] For the record, the parties representing the plaintiff that were involved in the negotiations at the material time did not include William Bruce Clarke and Terrance John Hamilton. William Bruce Clark affirmed the plaintiff's second affidavit on 6 March 2003 as seen in encl 16. William Bruce Clarke also affirmed the plaintiff's sixth affidavit on 6 September 2004 as reflected in encl 32. Again, William Bruce Clarke also affirmed the plaintiff's seventh affidavit on 13 September 2004 as seen in encl 33. While Terrance John Hamilton affirmed the plaintiff's first affidavit on 26 December 2002 as seen in encl 13. As there were no documents, and as contended by Graham Ogilvie the issue of limitation of liability clause was only discussed verbally, then any averments by these personalities on this issue must be ignored.

[53] On the defendants' side, the parties involved in the discussion included Stephen Malcolm Knapp, William Douglas King, Jan Anders Borg and Bob Ogletree and they all deny that the plaintiff and in particular Graham Ogilvie had ever raised an objection to incorporate the TSA into the agreement for the 'extended project services' much less the issue of limitation of liability or the obligation to arbitrate. It is significant to note that Archibald H McCallum who acted for the plaintiff at the crucial period of time has affirmed an affidavit before the notary public of the Province of Ontario, Canada on 12 July 2004 and that affidavit was annexed as

A exh 'RCG-2' to the affidavit of Rodney Colin Gomez affirmed on 23 August 2004 as seen in encl 30. Archibald H McCallum deposed in his affidavit to the effect that as a consultant to the plaintiff he was in a position to recollect the relevant event and that was that the TSA was likewise applicable for the 'extended project services'.

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[54] James Kenneth McLay, a consultant to the defendants, affirmed an affidavit in reply on 30 March 2004 as seen in encl 22 and there he deposed that he was informed in 2003 by Graham Ogilvie that the latter was under the impression that the 'extended project services' were performed pursuant to the terms of the TSA.

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[55] Upon the completion of the whole project, the plaintiff was not only satisfied but was indeed elated with the services provided by the defendants. This prompted the plaintiff to issue the letter of appreciation dated 18 February 1999 as alluded to in the early part of this judgment. The issuance of the letter of appreciation must be taken to signify that as late as February 1999 the plaintiff bore no complaint against the services provided by the defendants. The two letters dated 4 February 1999 (from Messrs Raja Darryl and Loh) and dated 28 January 1998 (from Messrs Owen-Bird) which were annexed to the affidavit in reply of Bob Ogletree that was affirmed on 27 September 2004 which in turn were all marked as exh 'RCG-7' to the affidavit of Rodney Colin Gomez that was affirmed on 29 September 2004 as reflected in encl 36 clearly signify that the plaintiff had accepted that the TSA was applicable and that the plaintiff knew that it was unable to launch a claim against the defendants. That would be the irresistible conclusion. Otherwise, it defies common sense that any such congratulatory letter of thanks would have been issued by the plaintiff in the first place.

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G ENCLOSURE 49

[56] The SAR was right in ordering the stay pursuant to s 6 of the Arbitration Act 1952 (Act 93). I affirmed the decision of the SAR and, accordingly, dismissed the plaintiff's appeal in encl 49 with costs.

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[57] The plaintiff cannot sweep all the contemporaneous documents under the carpet and say that there was no need to refer the dispute to arbitration. The advantages of arbitration can never be listed with exactitude. Privacy of the hearing and confidentiality are two major benefits of arbitration.

I

[58] Coleman J in *Hassneh Insurance Co of Israel & Ors v Steuart J Mew* [1993] 2 Lloyd's Rep 243 at p 247 aptly said in regard to privacy:

> If the parties to an English law contract refer their disputes to arbitration they are entitled to assume at the least that the hearing will be conducted in private. The assumption arises from a practice which has been universal in London for hundreds of years and, I believe, undisputed. It is a practice which represents an important advantage of arbitration over the courts as a means of dispute resolution. The informality attaching to a hearing held in private and the candour to which it may give rise is an essential ingredient of arbitration, ...

[59] On confidentiality, I need to refer to the case of *Dolling-Baker v Merrett Ors* [1991] 2 All ER 890; [1990] 1 WLR 1205 (CA) at p 1213 which held that in the absence of an express term in an arbitration clause providing for confidentiality, then the presumption of confidentiality arises as an implied term by the very nature of the arbitral process itself.

[60] It is now accepted, by all and sundry, that arbitrations are private and confidential (*Liverpool City Council v Irwin & Anor* [1977] AC 239; [1976] 2 All ER 39 (HL), *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555; [1957] 1 All ER 125 (HL) and *Ali Shipping Corp v Shipyard Trogir* [1998] 2 All ER 136; [1999] 1 WLR 314 (CA, Eng)). It is inconceivable that with all these endearing points, the plaintiff will not want to have access to arbitration.

ENCLOSURE 48

[61] In allowing the application of the defendants to stay the proceedings pursuant to s 6 of the Arbitration Act 1952 (Act 93), the SAR ordered that the costs of the application be costs in the cause.

[62] The general principle of law as set out in O 59 r 3(2) of the Rules of the High Court 1980 ('the RHC') is this. That 'costs to follow the event'. It means that the plaintiff as the unsuccessful party has to pay the costs to the defendants who are the successful parties. The plaintiff as the unsuccessful party is left to bear its own costs. This general principle of law should be dutifully followed 'except when it appears to the court that in the circumstances of the case some other order should be made'. Order 59 r 3(2) of the RHC states as follows:

> 3 When costs to follow the event
>
> (2) If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.

[63] Hashim Yeop A Sani SCJ in *Petroliam Nasional Bhd (PETRONAS) & Anor v Cheah Kam Chiew* [1987] 1 MLJ 25 (SC) sets out the general principles governing costs. At p 26 of the report, this was what His Lordship said:

> The general principle envisaged in the rule is simply that costs follow the event and that the successful party is entitled to be paid his costs except when it appears to the court that in the circumstances of the case some other order should be made. The same principle was enunciated in greater detail by Parker LJ in *Ottway v Jones* [1955] 2 All ER 585, at p 591:
>
> > One starts with this, that, as a general principle, costs follow the event, and the successful party is entitled to be paid his costs unless there are special grounds to order otherwise, and those grounds, it is well settled, must be grounds connected with the cause of action. No doubt, also, where a plaintiff has wholly failed to establish his title or his right, it is impossible judicially to order the successful defendant to pay the plaintiff's costs. Indeed, as is shown by the cases to which my Lord has referred, it is there said that the occasion for the exercise of the discretion does not arise until the plaintiff has established his right.
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> Because costs is in the discretion of the court there has been a rule of practice of the House of Lords as stated by Viscount Cave LC in *Donald Campbell & Co Ltd v Pollak* [1927] AC 732 that no appeal would lie for costs only but the House will however entertain an appeal from an order of the Court of Appeal as to costs, where it is alleged that the order is founded upon an error of law.

[64] Reference should be made to the case of *Re Elgindata Ltd (No 2)* [1993] 1 All ER 232 and there the court has this to say: that the general rule that costs should follow the event does not cease to apply even though the successful party raises issues or makes allegations that later fail, but the successful party could be deprived of his costs in whole or in part where he has caused a significant increase in the length of the proceedings.

[65] The successful respondent obtained judgment against the appellant in respect of its claim for rental and the Court of Appeal held that the respondent was entitled to costs as costs follow the event: *Lee Guan Par v Hotel Universal Sdn Bhd* [2005] 4 MLJ 589 (CA).

[66] It is prudent to remember that costs are always in the discretion of the court. And the court may exercise its discretion in favour of the party who has shown a willingness to settle the dispute. In the event the court decides to make no order as to costs, then each party will bear his own costs (*In re Hodgkinson, Hodgkinson v Hodgkinson* (1895) 2 Ch 190). But if the court decides to make an order as to costs then the rules direct that it should be for 'costs to follow the event', unless in the circumstances, 'some other order should be made as to the whole or any part of the costs' (see O 59 r 3(2) of

the RHC). What this means is this. That the party who succeeds in the proceedings is to recover his costs from the unsuccessful party and the latter is to bear his own costs.

[67] The SAR did not give any reason as to why this simple rule as laid down in O 59 r 3(2) of the RHC was not complied with. No submission was advanced by the plaintiff to show that there exist some circumstances that merit a departure from the general rule.

[68] For all these reasons, I allowed the defendants' appeal in encl 48 with costs.

Appeal allowed with costs.

Reported by Sally Kee